UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEAN A. ARSENAULT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 94-298-P-C***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises the single issue of whether substantial evidence in the record supports the Commissioner's determination that the plaintiff is able to perform jobs that exist in significant

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[1] Donna E. Shalala, Secretary of Health and Human Services, was originally named as the defendant in this matter. On March 31, 1995 the Social Security Administration ceased to be part of the Department of Health and Human Services and became an independent executive branch agency. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, §§ 101, 110(a). Concerning suits pending as of that date against officers of the Department of Health and Human Services, sued in an official capacity, Congress has authorized the substitution of parties as necessary to give effect to the change. Such substitution is so ordered here and I will therefore refer to all determinations made by the Social Security Administration in this case as those of the Commissioner.

[2] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on July 19, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

numbers in the national economy, and thus that the plaintiff is not disabled. The plaintiff contends that the required evidentiary foundation is lacking, and thus that he is entitled to a remand with directions to award benefits, because (i) the administrative law judge misstated a key piece of vocational evidence in his decision, (ii) the vocational expert did not take driving distances into account in her assessment of job availability and (iii) no restrictions on the plaintiff's ability to sit were included in the hypothetical posed to the vocational expert. The plaintiff further contends that the administrative law judge did not adequately apprise the vocational expert of the limits on the plaintiff's intellectual functioning, and that the judge erroneously rejected the plaintiff's testimony concerning his residual functional capacity for work. I recommend that the court affirm the decision of the Commissioner.

I. Background

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since May 5, 1992, Finding 2, Record p. 25; that he suffers from severe low back strain, spondylolysis and obesity, but that he does not have an impairment or combination of impairments that meets or is equal to any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record p. 25; that he is unable to perform his past relevant work as a fish processing plant worker, weatherization worker, shipbuilding laborer, ice processing plant worker, custodian, bottling plant worker or waterbed manufacturing laborer, Finding 7, Record p. 26; that he has a "limited" education and unskilled work experience, Findings 9-10, Record p. 26; that he

retains the residual functional capacity to lift up to 15 pounds and walk moderate distances, Finding 5, Record p. 26; that he can understand, remember and carry out instructions despite poor verbal skills and some difficulty with memory and concentration, *id*.; that he cannot work with his arms overhead, bend forward repeatedly, squat, climb or kneel, *id*.; that, despite these findings, there exists a significant number of jobs in the national economy the plaintiff could perform, including those of hand packager, production worker, checker and examiner, Finding 12, Record p. 26; and that, therefore, the plaintiff was not under a disability at any time prior to the administrative law judge's decision on February 3, 1994, Finding 13, Record p. 26. The Appeals Council declined to review the decision, Record pp. 6-7, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Servs.*, 654 F. 2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

Because the Commissioner determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Commissioner at Step 5 of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. §§ 404.1520(f); 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Commissioner's findings regarding both the plaintiff's

residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

II. The Vocational Evidence

At the hearing on the plaintiff's claim for benefits, vocational expert Susan McCarron provided examples of jobs capable of being performed by the plaintiff of which there are significant numbers in the national economy. She stated that in Maine there are 369 "hand packing" jobs, 190 "production checker and examiner" jobs and 433 assembly jobs, all capable of being performed at the sedentary exertional level. Record p. 49. She further testified that the number of hand packing jobs throughout New England is 3,690 and throughout the national economy 36,900. *Id.* at 50. The administrative law judge mischaracterized this testimony in his decision, stating: "The vocational expert testified that . . . the claimant can make a successful vocational adjustment to such jobs as hand packager, production worker, checker and examiner. The expert witness testified that there are 3690 such jobs in Maine and 36,990 nationwide." *Id.* at 24.

I do not agree with the plaintiff that this mistake taints the decision of the administrative law judge. Rather, his error is harmless because the numbers of available jobs cited by the vocational expert meet the Commissioner's definition of work that exists in significant numbers in the national economy. *See* 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (defining "work which exists in the national economy" as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country"); 20 C.F.R. §§ 404.1566(a), 416.966(a) ("work exists in the national economy when it exists in significant numbers either in the region where [the

claimant] live[s] or in several other regions of the country"); *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 276 (1st Cir. 1988) (distinguishing "significant numbers" from "isolated jobs").

Nor can I agree with the plaintiff that the Commissioner's finding of significant jobs in the national economy capable of being performed by the plaintiff is flawed because the vocational expert did not consider whether it would be possible for the plaintiff to commute to such jobs. The logistical considerations that would either permit or prevent the plaintiff from taking particular jobs are not relevant.[3] "The standard is not employability, but capacity to do the job; `. . . not whether claimant could actually locate a job but whether health limitations would prevent him from engaging in substantial gainful work.'" *Id.* (citation omitted); *see also Rodriguez v. Secretary of Health & Human Servs.*, 893 F.2d 401, 404 (1st Cir. 1989) (no requirement to consider actual ability of claimant "to find and hold a job in the real world"); 20 C.F.R. §§ 404.1566(a)(1), 416.966(a)(1) (whether work exists in claimant's "immediate area" not a relevant consideration).

Arguing to the contrary, the plaintiff relies on *Hall v. Bowen*, 837 F.2d 272 (6th Cir. 1988). In that case, the Sixth Circuit undertook a discussion of what constitutes a significant number of available jobs, noting the lack of a "magic number" that comprises the boundary between significant and insignificant. *Id*. at 275. The court observed that a judge should consider "many criteria" in making such a determination, and that "some of [them] *might* include," *inter alia*, "the distance claimant is capable of travelling to engage in the assigned work." *Id*. (emphasis added). *Hall* does

[3] The plaintiff further contends that the administrative law judge actually prevented him from eliciting testimony from the vocational expert on the issue of commuting distances. Such a ruling is not reflected in the record; the plaintiff's position is that both the transcript and the tape recording of the hearing are inaccurate. I need not make a determination as to the accuracy of the record because the outcome does not turn on the extent to which the administrative law judge permitted questioning on the subject.

not stand for the proposition that it is error for the Commissioner to fail to take such a factor into consideration, especially in view of the court's observation that "[t]he decision should ultimately be left to the trial judge's common sense in weighing the statutory language as applied to a particular claimant's factual situation." *Id*.

At oral argument, the plaintiff cited another Sixth Circuit case, *Born v. Secretary of Health & Human Servs*., 923 F.2d 1168 (6th Cir. 1990). In *Born*, a vocational expert had testified to the existence of 800,000 full-time jobs in the national economy capable of being performed by the claimant, 2,500 of them in the claimant's local region and 125,000 in his home state of Tennessee. *Id*. at 1174. The court rejected the claimant's contention that this evidence was insufficient because the vocational expert did not meet the claimant's requirement of a six-hour workday with alternate sitting and standing. *Id*. at 1174-75. In so holding, and with reference to the "common sense" approach articulated in *Hall*, the court observed that it was reasonable for the Secretary to assume a significant percentage of the jobs cited by the vocational expert would be part-time in nature. *Id*. at 1175. The court also noted that "[t]he types of jobs which the vocational expert identified do not appear to be of an isolated nature" in light of the testimony about 2,500 jobs in the local region. *Id*.

Beyond the general reference to common sense, I do not read *Born* as providing anything in the way of meaningful guidance as to when testimony of a vocational expert is insufficient to sustain a finding of a significant number of jobs in the national economy capable of being performed by a claimant. To the extent the plaintiff cites *Born* for the proposition that the jobs cited by a vocational expert may be too geographically isolated to permit the Commissioner to deny benefits, I must disagree. The case law in this circuit is clear: SSI and SSD benefits are not available to fund a claimant's decision to live far from available jobs. *Lopez Diaz v. Secretary of Health & Human*

Servs., 585 F.2d 1137, 1140 (1st Cir. 1978) (discussing disability benefits). It is only when a claimant's "locomotive disabilities render it impossible, or extremely difficult, for him to physically move his body from home to work," and thus the issue of commuting is no longer "extrinsic to [the claimant's] disabilities," that the geographic distance between the claimant and actual jobs becomes a relevant consideration. *Id*.; *cf. Rivera v. Sullivan*, 771 F. Supp. 1339, 1356 (S.D.N.Y. 1991) (administrative law judge improperly failed to consider undisputed evidence of claimant's inability to ride public transportation unassisted). In the absence of any contention that the plaintiff's disabilities affect his ability to commute, the administrative law judge properly did not consider the issue of geographic isolation in making the disability determination.

III. The Plaintiff's Residual Functional Capacity for Sitting

Next, the plaintiff contends that the Commissioner's Step 5 finding lacks the requisite evidentiary foundation because the hypothetical posed to the vocational expert did not include any restrictions on the plaintiff's ability to sit. When the medical evidence of record does not support the hypothetical posed to a vocational expert, the expert's response cannot become the basis of a finding that the claimant is not disabled. *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994).

The plaintiff cites no evidence that was presented as part of the hearing record, but rather refers to the progress notes and accompanying letter of a treating physician, John B. Ayres, M.D., submitted after the hearing to the Appeals Council. Based on an examination conducted on May 5, 1994 and a review of previously existing x-rays of the plaintiff's back, Dr. Ayres recommended that the plaintiff be restricted to "no sitting for more than 15-20 minutes at a single stretch with alternating positions." Record pp. 189-90. The Appeals Council considered the report of Dr. Ayres

but rejected it in light of a contradictory finding by a non-treating physician, John P. Greene, M.D., following an examination of the plaintiff. *Id.* at 6-7. Notwithstanding a diagnosis of chronic low back pain, spondylolysis at the L5 and S1 vertebrae, morbid obesity and a deformity associated with a previous compression fracture at the L1 vertebra, Dr. Greene explicitly found no restrictions on the plaintiff's ability to sit. *Id.* at 169. It is the function of the Commissioner, and not the court, to resolve conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). Nothing requires the Commissioner to reject Dr. Greene's finding in favor of that reached by Dr. Ayres, even assuming (as the Appeals Council apparently did) that the latter's views comprise new and material evidence.[4] Dr. Ayres conducted his examination following the determination of the administrative law judge, although it appears the x-rays he evaluated may have antedated the determination. *See* 20 C.F.R. §§ 404.970(b), 416.1470(b) (Appeals Council may consider new evidence "only where it relates to the period on or before the date of the administrative law judge hearing decision"). Dr. Greene's finding on the plaintiff's ability to sit provides substantial evidence in the record to support the Commissioner's finding to the same effect.[5]

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[4] The plaintiff also contends that the report of Dr. Ayres demonstrates that a lack of financial resources deterred him from seeking additional medical treatment. I discuss the significance of this below.

[5] In declining to review the decision of the administrative law judge, the Appeals Council made the following observation:

> Dr. Ayres noted that his positing any restrictions was qualified by the fact that he based a considerable portion of his opinion on [the plaintiff's] treatment history. The record shows [the claimant does] not have a history of any intense or frequent treatment.

Record p. 6. At oral argument, the plaintiff attacked this observation as "irrational." I disagree. What Dr. Ayres stated is that

(continued...)

Next, the plaintiff contends that the hypothetical posed to the vocational expert was fatally flawed in its failure to note that the plaintiff is unable to perform tasks that require at least average intelligence. The administrative law judge explicitly made a finding to that effect in his decision. Record p. 20. The hypothetical he posed to the vocational expert did not convey this finding, although it provided a detailed outline of certain intellectual limitations, *i.e.*, inability to perform serial counting or to count backwards, difficulties with attention and concentration, poorly developed verbal skills and verbal comprehension, difficulty with short-term auditory memory and difficulty anticipating the results of one's actions, poor visual motor skills, visual memory coordination and ability to learn non-verbal material. *Id.* at 47-48. I cannot agree with the plaintiff that the manner in which the administrative law judge described his mental impairments to the vocational expert was inadequate.

The plaintiff does not challenge the lack of a finding at Step 3 that his intellectual impairments meet or equal any of the Listings.

> However, in determining the impact of a mental disorder on an individual's capacities, essentially the same impairment-related medical and nonmedical information is considered to determine whether the mental disorder meets listing

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[5](...continued)
> much [of his observations about the plaintiff's capacity for work] is based upon listening to the patient's history and examining the patient. A specific work capacity evaluation from a reputable firm would be more objective evidence to document what the patient can and cannot do.

Id. at 189. In this regard, it is noteworthy that, although Dr. Ayres is a treating physician, he stressed in his May 6, 1994 letter that he had been treating the plaintiff for an ankle fracture (as opposed to back problems). *Id*. I find nothing irrational in the Appeals Council having drawn the inference that Dr. Ayres wished his views on the plaintiff's work capacity to be viewed with some skepticism because they were based at least in part on non-objective findings. Accordingly, the points made at oral argument do not affect my view that the court should not disturb the Commissioner's decision to credit the views of Dr. Greene to the extent they were at variance with those of Dr. Ayres.

> severity as is considered [at Step 5] to determine whether the mental impairment is of lesser severity, yet diminishes the individual's [residual functional capacity].

Social Security Ruling 85-16, reprinted in *West's Social Security Reporting Service*, at 353 (1992). "[A]ll limits on work-related activities resulting from the mental impairment must be described in the mental [residual functional capacity] assessment." *Id*. at 354. The regulations provide that "[a] limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, co-workers, and work pressures in a work setting, may reduce [the claimant's] ability to do past work and other work." 20 C.F.R. §§ 404.1545(c), 416.945(c). This "presents the broad issues to be considered" in determining the effect of mental disorders on a claimant's residual functional capacity; consideration of these factors is "required for the proper evaluation of the severity of mental impairments." Ruling 85-16 at 353.

The limitations described by the administrative law judge in the hypothetical posed to the vocational expert track the factors set forth in the quoted regulations. The plaintiff does not challenge the accuracy of these limitations, but rather contends that the administrative law judge should additionally have explicitly stated that the plaintiff's intellectual functioning was below the average level. I know of no authority for such a requirement, so long as the assessment of the plaintiff's residual functional capacity includes the required factors.

IV. The Credibility Determination

Finally, the plaintiff asserts that the record does not support the administrative law judge's finding that he is not as limited as he contended at the hearing. The judge noted the plaintiff's testimony that he has difficulty lifting heavy objects, standing or sitting for prolonged periods and performing any prolonged physical activity. Record p. 22. However, the judge found these statements "not entirely credible" because "the claimant's own description of his activities supports a finding that he can perform non-strenuous work on a sustained basis" and "the claimant's allegation that he can do no work is out of proportion with [sic] the degree of treatment required." *Id.* at 22-23; Finding 4, Record p. 25.

The plaintiff objects to the judge's underlying observations that he performs no household chores, Record pp. 22, 23, that he engages in recreational activities, *id.* at 22, and that his allegation that he can do no work is out of proportion with the degree of treatment he has required, *id*. at 22-23. As to the recreational activities, the plaintiff points to a disability report he completed in February 1993 indicating that he engages in no recreational activities or hobbies. *Id.* at 86, 88. This appears to be the only statement in the record in which the plaintiff refers explicitly to recreational activities as such, although in his testimony he noted that his daily activities include visiting friends, watching television, shopping and spending time with his girlfriend. *Id.* at 36-37. As for household chores, the plaintiff gave no testimony at the hearing about performing such activities, although he indicated in his February 1993 disability report that he cooks two meals a day for himself and his girlfriend, does some grocery shopping, but is unable to undertake any cleaning tasks. *Id.* at 86. In a pain questionnaire completed in March 1993, the plaintiff reported doing "[a] few household chores until [the] pain starts again." *Id.* at 116. I have no reason to quibble with the administrative law judge's

having equated visiting, TV watching and shopping with recreation, but I agree with the plaintiff that the record does not support a finding that he performs no household chores whatsoever.[6]

However, there is no reason to question the finding that the plaintiff's assertion that he can do no work is out of proportion to the medical treatment required. The plaintiff contends that the report of Dr. Ayres demonstrates that he did not seek more extensive treatment because he could not afford it.[7] However, the administrative law judge did not draw any inference from a perceived decision by the plaintiff to eschew further medical treatment; rather, the judge was referring to the level of treatment medically required given the objective diagnoses in the record. As to the broader question of whether the record supports the administrative law judge's overall negative credibility determination, the case law provides some guideposts. The Commissioner may determine that subjective complaints of pain by a claimant are not credible, as long as her decision states "why subjective testimony of limitation of function because of pain is not supported by the evidence."

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[6] The plaintiff would have the court infer that the administrative law judge denied benefits here because he believes the plaintiff is not doing household chores. The plaintiff endeavors to put words into the mouth of the administrative law judge by referring to a denial of benefits "for the claimant's failure to undertake household chores." Plaintiff's Itemized Statement of Errors (Docket No. 4) at 8. Nothing in the record supports the inference that the administrative law judge made any value judgments about the level of the plaintiff's domestic activity. Rather, the administrative law judge was attempting, albeit with less than complete accuracy, to bring the record evidence of the plaintiff's daily activities to bear on his determination of the plaintiff's capacity for work.

[7] According to Dr. Ayres in May 1994,

> [t]he patient had some trouble with his back perhaps 10 years ago. . . . With persistent symptoms the patient saw Dr. Keating who felt he had a strain. The patient eventually saw a chiropractor, Dr. Dennis, and had some manipulation which according to the patient helped his movement. The patient has not worked since April of 1992. He is not going to his chiropractor at present due to no reimbursement. He has been denied Social Security insurance.

Record p. 190.

Avery v. Secretary of Health & Human Servs., 797 F.2d 19, 22 (1st Cir. 1986); *see also* Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 655 (1992). When an administrative law judge questions a claimant thoroughly about his subjective symptoms in accordance with the principles set forth in *Avery*, which requires detailed questioning about daily activities and the effect of pain thereupon, *Avery*, 797 F.2d at 23, "[t]he credibility determination by the [administrative law judge], who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings." *Frustaglia v. Secretary of Health & Human Servs*., 829 F.2d 192, 195 (1st Cir. 1987).

Although troubling, because it suggests something other than a careful review of the evidence, the administrative law judge's finding of no household chores does not poison his overall rejection of the plaintiff's characterization of his limitations. If anything, a more accurate finding as to the level of household activity would have provided even more support for the ultimate determination that the plaintiff is able to perform more tasks than his testimony about pain indicated. The findings as to the plaintiff's recreational activities, and the observation that the plaintiff's pain complaints are out of proportion to the medical treatment he has required, support the credibility determination and are themselves well grounded in the record.

V. Conclusion

Accordingly, I recommend that the Commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 25th day of July, 1995.

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David M. Cohen
United States Magistrate Judge